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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 357

J. NEWTON BRAMBLETT, ELIZABETH BRAMBLETT, his wife; FRANK J. STEFANICH, EFFIE M. STEFANICH, his wife; STUART M. WHITE, HELEN K. WHITE, his wife; JAMES G. HUEBNER, a widower; TIM MAZZONI, GLADYS MAZZONI, his wife; F. M. HAMMACK and NIVA M. HAMMACK, his wife,

Petitioners,

vs.

W. FRANCIS WILSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of Arizona

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Petitioners,

vs.

W. FRANCIS WILSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of Arizona

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of

Arizona, entered in the above case on June 6, 1962, which reversed the judgment of the Superior Court of the State of Arizona, in and for the County of Maricopa, a Court of general jurisdiction and which Superior Court had entered judgment in favor of Petitioners after a trial on the merits; that on June 15, 1962, Petitioners filed in said Supreme Court a petition for re-hearing; that on June 19, 1962, Petitioners filed in said Supreme Court additional authorities in support of their petition for rehearing; that on June 29, 1962 Respondent filed written objections in said Supreme Court to said rehearing; on July 5, 1962, the said Court denied a rehearing.

The said Supreme Court reversed the said trial court on the ground that the California judgment, hereinafter mentioned, did not bar Respondent in the prosecution of his said action in said Superior Court of Maricopa County. In reversing the said Superior Court, the said Supreme Court of Arizona ordered judgment in favor of Respondent in the sum of $9645.54, together with interest thereon at the rate of 6% per year from August 30, 1951.

OPINION BELOW

The judgment of the Superior Court of Maricopa County is not reported. The judgment of the Supreme Court of Arizona is in 371 Pac. (2d) 1014 reported; a copy of the Opinion of the Supreme Court of Arizona is attached hereto (Appendix A).

The Opinion of the District Court of Appeal of the State of California, in and for the Fourth Appellate District deciding this case in California in favor of Petitioners is reported in 151 Cal. App. (2d) 369, 311 Pac. (2d) 22, and a copy of said Opinion is attached hereto (Appendix B).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, Section 1257 of U. S. C. A. and Article IV, Section 1 of the United States Constitution.

Adam v. Saenger, 58 Supreme Court Reporter 454.

QUESTIONS PRESENTED

1. Whether the Supreme Court of Arizona gave full faith and credit to the final judgment of *Wilson v. Bramblett* decided by the District Court of Appeal of the State of California, Fourth Appellate District, and reported in 151 Cal. App. (2d) 369, 311 Pac. (2d) 22.

2. Whether the said judgment in *Wilson v. Bramblett,* decided in California, is res judicata and a complete defense to the action filed in Arizona and which was decided on Respondent's appeal by the Supreme Court of Arizona in favor of Respondent.

STATEMENT

Respondent filed an action against Petitioners in the Superior Court of the State of California, in and for the County of Fresno, being a Court of general jurisdiction, on an alleged promissory note in the principal sum of $9845.54 and upon which it was alleged there had been paid $200.00.

The Respondent is at all times an attorney at law, practicing his profession in the State of Arizona, and he allegedly performed services as said attorney for Petitioners. The Petitioners were members of a limited partnership, the general partners of which were J. Newton Bramblett, Frank J. Stefanich and C. M. S. Kipling. The note was allegedly executed to Respondent by two of the general partners for alleged fees due to Respondent. However, the note signed by the two general partners did not indicate that it was a partnership obligation. The note was drawn by Respondent as an individual note of the two partners who signed it. The note was drawn in duplicate. The two general partners signed a copy thereof and left it with Respondent on the condition that the third general partner would sign the original note with the other two general partners and the copy so signed by two of the general partners was left with Respondent on the condition that the third general partner would sign the original note with the other two general partners and in the event the third partner would not sign the original note with the other two general partners the copy left with Respondent would be returned to the partners who signed it. The third

general partner refused to signed the original note and Respondent refused to return the signed copy he was given, and instead thereof, he altered the same by having the note appear that it was a partnership obligation and one of the general partners signed the said altered note. Respondent filed suit on said altered note in the Superior Court of the State of California, in and for the County of Fresno, and after a trial on the merits, Petitioners were given judgment that Respondent take nothing. A fuller statement of the facts in the California case will be found in the report of *Wilson v. Bramblett,* 151 Cal. App. (2d) 369 (Appendix B).

After the California judgment in favor of Petitioners became final, Respondent filed the present action in the Superior Court of Maricopa County, Arizona against these Petitioners seeking to collect his fee on a stated account and on an open account. To Respondent's Complaint, the Petitioners filed an Answer and set up several defenses thereto, which defenses not only consisted substantially of a general denial, but also that the California judgment, above mentioned, constituted a bar to the prosecution of said action in Arizona on the general ground of res judicata and estoppel. After a trial on the merits in the Superior Court in Arizona, the Court entered judgment in favor of Petitioners, holding that the California case was a bar to the prosecution of the Arizona case under the doctrine of res judicata and estoppel. Respondent appealed to the Supreme Court of Arizona from that portion of the judgment of the

trial court which held that the Arizona case was barred on the ground of res judicata.

It is conceded by the Supreme Court of Arizona that this action in Arizona is based upon the same transaction previously brought in California in which Petitioners received judgment and that both actions in California and Arizona are predicated on alleged legal services rendered to Petitioners by Respondent. However, the Supreme Court of Arizona did not give full faith and credit to the California judgment. It bases its decision on the holding that the suit in Arizona upon a stated account and upon an open account are different causes of action than the action in California based on the note, although the stated account, open account and the note all arose out of the same transaction, namely, the attempted recovery by Respondent for attorney's fees allegedly rendered to Petitioners.

REASONS FOR GRANTING THE WRIT

This case presents an important constitutional question involving the full faith and credit clause of Article IV, Section 1 of the United States Constitution, and the Arizona decision is contrary to the previous rulings of this Court.

See *Adam v. Saenger*, 303 U.S. 59, 58 S. Ct. 454.

In determining whether the doctrine of res judicata applies to this case, the laws of California must determine the issue.

See *Adam v. Saenger*, 303 U.S. 59, 58 S. Ct. 454;
Angel v. Bullington, 67 S. Ct. 657.

It is well settled in California that in an action on a promissory note the plaintiff may join a count for the alleged consideration given for the note, such as a book account or an account stated, because they involve the same transaction and the action seeks to recover the same amount of money.

See *Goldwater v. Oltman,* 210 Cal. 408, 292 Pac. 624.

It was Respondent's unfortunate choice in failing to join in the California case a count for an account stated or book account.

In *Wilson v. Bramblett,* 151 Cal. App. (2d) 369 (Appendix B) at page 374, the Court says:

> "Respondent's repudiation of the note left plaintiff free to sue on the original account. Although the evidence is conflicting, it appears that Bramblett and Stefanich never authorized the signing of the partnership name to the carbon copy of the note by Kipling. Appellant elected to stand on his chance of recovery on the carbon copy of the note, as thus altered. This was his unfortunate choice."

In *Baltimore S. S. Co. v. Phillips,* 47 S. Ct. 600, citing from an earlier case, the Court says:

> "A party seeking to enforce a claim, legal or equitable, must present to the Court, either by the pleadings or proof, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no

end to litigation if such a practice were permissible."

In *United States v. California & O. Land Co.*, 48 L. Ed. 476, this Court says on page 479:

"But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim (cases cited) and, a fortiori, he can not divide the grounds of recovery. Unless the statute of 1889 put the former suit upon a peculiar footing, the United States was bound then to bring forward all the grounds it had for declaring the patents void, and when the bill was dismissed, was barred as to all by the decree." (citing cases)

Respondent could have joined in the suit on the note in California a count on a stated account and on an open account for his alleged fees. He did not do this as he chose to stand solely on the alleged promissory note. The judgment in the California case is a complete bar to the action in Arizona.

It is the universal rule in this country and particularly in California that an adjudication bars future litigation between the same parties, not only as to all issues actually raised and decided, but also all issues that could have been raised and decided.

In *Sutphin v. Speik*, 15 Cal. (2d) 195, 99 Pac. (2d) 652, the Court says on page 201 of the California citation:

"As already indicated, defendant's contention that the doctrine of *res judicata* is not applicable

here is grounded upon the proposition *that the causes of action* involved in the prior and present suit are different, and that the defenses that title had been acquired from the state, and that the oil was being taken from the lands outside the boundaries of the lots, were not raised in the prior action. A complete answer to this contention may be found in an examination of the scope of the doctrine of *res judicata,* which has been fully considered by this court in recent cases."

And continuing on page 202, the Court says:

"Next is the question, under what circumstances is a matter to be deemed decided by the prior judgment? Obviously, if it is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment. But the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. *A party cannot by negligence or design withhold issues and litigate them in consecutive actions.* Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable. In *Price v. Sixth District,* 201 Cal. 502, 511 (258 Pac. 387), this court said: 'But an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result . . . This principle also oper-

ates to demand of a defendant that all of its defenses to the cause of action urged by the plaintiff be asserted under the penalty of forever losing the right to thereafter so urge them.'"

A petition for rehearing was filed in the *Sutphin* case and denied which is reported in 100 Pac. (2d) 497, and also in 15 Cal. (2d) at page 205 where the Court says on the rehearing:

"After that judgment became final, plaintiff's right to a portion of the production from those wells was conclusive as between the parties, even in the present suit on *a different cause of action*, because the basic issue thus decided in the first case is identical with that in the present case. Defendant, in his petition, has again urged that the former judgment cannot be *res judicata* as to the *new issue* of the title to oil from wells bottomed on state land, which title was acquired after the conclusion of the first action. The difficulty with this argument is that the asserted 'new issue' is not such in fact. Defendant has simply offered another legal theory by which the *same issue* might be differently decided. If he may have a new trial of the issue of right to the production of the oil from these wells because of the new argument that the source of the oil must be considered, then it would seem that in subsequent actions he may raise a 'new issue' as to the title of A, B, C, or other possible claimants in addition to the state. In short, defendant's contention is that though the prior judgment determined that plaintiff had a right to a specified percentage of the production of oil from any wells on certain land, plaintiff may be compelled to reliti-

gate that right whenever defendant can discover a new theory upon which to attack it. This proposition is without support in principle or authority."

The rule is well settled in Volume 2, *Freeman on Judgments*, 5th Edition, page 1443, as follows:

"A party cannot by varying the form of action or adopting a different method of presenting his case escape the operation of the principle that one and the same cause of action shall not be twice litigated. Where either of two remedies is equally available to vindicate the same right, the judgment in an action employing one of them will bar a resort to the other."

See also

Angel v. Bullington, 67 S. Ct. 657 at 659;
Wulfjen v. Dolton, 24 Cal. (2d) 891;
Panos v. Great Western Packing Co., 21 Cal. (2d) 636, 134 Pac. (2d) 242.

The decision of the Supreme Court of Arizona is contrary to the established law when it held that the action filed in Arizona by Respondent based upon a stated account and an open account were different causes of action from the case in California based upon the promissory note. The action in California and the action in Arizona all arose out of the same transaction and the same alleged debt, and each action sought to recover for the same amount of money namely, the alleged value of Respondent's attorney's fees. The Arizona Court mistakenly applied the Arizona law to this case whereas, it should have applied

the California law and the law laid down by this Court which is that the action on the note, account stated and book account arising out of the same transaction and seeking a recovery for the same debt are not separate causes of action.

The ruling of the Supreme Court of Arizona is contrary to the case of *Baltimore S. S. Co. v. Phillips*, 47 S. Ct. page 600 at page 602 where this Court said:

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action."

See also

American Fire & Casualty Co. v. Finn, 71 S. Ct. 534 at 539.

The leading California case of *Frost v. Witter*, 132 Cal. 421, 64 Pac. 705 defines the term "cause of action". This case involved the question of whether a plaintiff could amend his Complaint on a promissory note which Complaint was filed two days before the statute of limitations had run. The plaintiff after the statute had run, sought to amend his Complaint by adding an additional count for the foreclosure of a mortgage securing said note. If the amendment changed the cause of action the California law would

not allow the amendment. However, the Court held that the amendment did not change the cause of action because it sought to enforce a single obligation. On page 426 the Court lays down the rule as to the meaning of the term "cause of action" as follows:

> "In applying the rule, some confusion has resulted from the neglect to define the terms, 'cause of action' and 'action'; to which, therefore, our attention must be first directed. The latter term is very commonly confounded with the *suit* (*litis*) in which the action is enforced. But this is not the technical meaning of the term, according to which an action is simply the right or power to enforce an obligation. 'An action is nothing else than the right or power of prosecuting in a judicial proceeding *what is owed to one*,'—which is but to say, an *obligation*. * * * The action therefore springs from the obligation, and hence the 'cause of action' is simply the obligation. This is in accordance with the view of Mr. Pomeroy, though expressed by him in new and somewhat awkward terms. (Pomeroy on Pleading and Practice, sec. 453.)
>
> The obligation thus constituting the cause of action may be either *ex contractu* or *ex delicto*; and again, the latter may be either for compensation or damages, or for restitution,—as, e.g., the obligation of a wrongdoer to restore the property of another. For, though there is a distinction between actions brought for the recovery of damages or compensation and those brought for restitution,—the latter constituting actions *in rem*, and the former actions *in personam*,—yet in either case the action is to enforce an obligation;

nor can there be an action for any other purpose. (1 Austin on Jurisprudence, sec. 527.)

The 'cause of action' is therefore to be distinguished, also, from the 'remedy',—which is simply the means by which the obligation or the corresponding action is effectuated,—and also from the 'relief' sought. (Pomeroy on Pleading and Practice, sec. 453.)

Applying these definitions to the case at bar, it is clear that the cause of action set up in the original and that set up in the amended complaint was simply the obligation sought to be enforced,—that is to say, the obligation to pay the money agreed to be paid,—and that the only change that took place was in the remedy by which it was sought to enforce the obligation.

This was the view taken in *Lackner v. Turnbull*, 7 Wis. 105, (affirmed in *Ball v. McGeoch*, 78 Wis. 359) where the original complaint was in *assumpsit* for work and labor, and the plaintiff was permitted to set up in an amended complaint a mechanic's lien, the court saying: "We do not think that, in strictness, the amendment which was made in this case did change the cause of action. It only changed the remedy; . . . but the "cause of action", or in other words, the labor performed and materials furnished (and it should be added, the corresponding obligation) were the same, whether the plaintiff proceeded under the original or amended complaint. By amending his complaint he was enabled to obtain relief which he would not have been entitled to under the original complaint, but the "cause of action" was not changed by the amendment."

Again in the case of *Stafford v. Yerge,* 129 Cal. App. (2d) 165 at 171 (276 Pac. (2d) 649), the Court in discussing the meaning of the term "cause of action" re: res judicata says:

> ". . . the term 'cause of action' has different meanings in different connections. It is commonly used in pleading to indicate the relief sought, even though the separately pleaded claims originate in the same right or obligation. But this is not the meaning of 'cause of action' where the term is used in stating the doctrine of res judicata. When used in this connection the term relates not to the remedy or the relief prayed for, but to the right or obligation which is sought to be enforced. (Citing case) If the second suit is based upon the same right or obligation as the first, the cause of action is the same even though different or additional relief is sought. (Citing *Frost v. Witter* and other case) 'It is the title, right or obligation sought to be established or enforced, not the remedy or the relief sought, which determines the nature and substance of the cause of action. When this has once been adjudicated it cannot be relitigated upon any grounds that were or that could have been determined in the former action'." (citing case)

The Arizona Court did not give full faith and credit to the California judgment as was mandatory under Article IV, Section 1 of the United States Constitution. The purpose of the constitutional provision is well stated in *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430; 64 S. Ct. 208 at page 214, as follows:

"These consequences flow from the clear purpose of the full faith and credit clause to establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered, so that a cause of action merged in a judgment in one state is likewise merged in every other. The full faith and credit clause like the commerce clause thus became a nationally unifying force. It altered the status of the several states as independent, foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application. (cases cited) Because there is a full faith and credit clause a defendant may not a second time challenge the validity of the plaintiff's right which has ripened into a judgment and a plaintiff may not for his single cause of action secure a second or greater recovery."

On Page 216 the Court, continues:

"The decision of the state court is not supported by the suggestion that the Texas award is not res judicata in Louisiana because respondent's suit there was on a different cause of action. When a state court refuses credit to the judgment of a sister state because of its opinion of the nature of the cause of action or the judgment in which it is merged, an asserted federal right is denied and the sufficiency of the grounds of denial are for this court to decide." (Citing cases)

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Dated, July 16, 1962.

Respectfully submitted,

DONALD R. FRANSON,
Counsel for Petitioners.

LAWRENCE W. YOUNG,
JOHN F. SULLIVAN,
Of Counsel.

(Appendices A and B Follow)

Appendix A

Supreme Court, State of Arizona
Phoenix
June 6, 1962

No. 6928

W. Francis Wilson,
Appellant,
vs.
J. Newton Bramblett and Elizabeth Bramblett, his wife, Frank J. Stefanich and Effie M. Stefanich, his wife, Stuart M. White and Helen K. White, his wife, James G. Huebner, a widower, Tim Mazzoni and Gladys Mazzoni, his wife, and F. M. Hammack and Niva M. Hammack, his wife, as individuals and as members of The Kipling Syndicate, Co-partnership, and The Kipling Syndicate, Co-partnership,
Appellees.

The Supreme Court of the State of Arizona has this date handed down its decision in the above-entitled cause, in which the judgment of the lower court was affirmed in part and reversed in part.

A copy of the decision is enclosed herewith.

Sylvia Hawkinson, Clerk.

To—
Richard A. Wilson,
Kent A. Blake,
Langmade and Sullivan, and
Lawrence W. Young.

In the Supreme Court of the State of Arizona
In Division

No. 6928

W. Francis Wilson,

Appellant,

vs.

J. Newton Bramblett and Elizabeth Bramblett, his wife, Frank J. Stefanich and Effie M. Stefanich, his wife, Stuart M. White and Helen K. White, his wife, James G. Huebner, a widower, Tim Mazzoni and Gladys Mazzoni, his wife, and F. M. Hammack and Niva M. Hammack, his wife, as individuals and as members of The Kipling Syndicate, Co-partnership, and The Kipling Syndicate, Co-partnership,

Appellees.

Appeal from the Superior Court of Maricopa County
The Honorable Henry S. Stevens, Judge.
Affirmed in Part and Reversed in Part.

Richard A. Wilson, Phoenix, and
Kent A. Blake, Phoenix,
Attorneys for Appellant.
Langmade and Sullivan, Phoenix,
and Lawrence W. Young,
Attorneys for Appellees.

M. T. Phelps, Justice (Retired)

This is an action brought by plaintiff-appellant in this state against defendants-appellees to recover the sum of $9,645.54 together with interest, for legal services rendered over a period of years. The parties will hereinafter be designated as plaintiff and defendants. The defendants were members of a limited partnership with headquarters in Fresno, California, operating under the name of The Kipling Syndicate.

The complaint in the instant case contains two counts: one based on a stated account and the second on an open account for legal services and for money advanced to defendants.

Plaintiff had previously brought an action in Fresno, California, against said defendants based upon the same transaction but predicated his action upon an original and a copy of a promissory note signed by two members of the partnership. Later the signature of the Kipling Syndicate by C. M. S. Kipling was added to the copy. Kipling and Ernest K. Bramblett and Lois Bramblett, his wife, were not served with process in the California case and neither appeared or answered the complaint.

In that case the trial court found that the original note was conditionally delivered and was to have no force or effect until signed by J. Newton Bramblett who refused to sign it, and that the copy was materially altered and C. M. S. Kipling had no authority to execute the note for the copartnership and consequently held the note invalid and of no force or effect.

Judgment was therefore entered for defendants and plaintiff appealed to the California District Court of Appeals.

The District Court of California in that case entitled Wilson v. Bramblett, 151 Cal. App. 2d 369, 311 P. 2d 22 (1957), said:

> "Many of the several defenses made by respondents and found by the Court as to why the note was unenforceable against defendants appear to be tenable. Without discussing them, we conclude that respondents' liability on the original note and copy thereof sued upon was conditional, depending upon the signature of Bramblett or ratification by the individuals signing and was not duly executed and delivered within the meaning of that term. This conclusion is sufficiently supported by the evidence and the law even though appellant retained a copy of the note. *It therefore becomes unnecessary to determine the other claimed defenses.*" (Emphasis supplied.) 311 P. 2d at 25.

The Court further said:

> "* * * It has been definitely held that where a note is given under an agreement that it is not to become binding until signed by another person, the failure to obtain said additional signature precludes a recovery as between the original parties or transferees who have notice of the agreement, unless the obtaining of the additional signature is wrongfully prevented by the maker. (Citing cases.)" 311 P. 2d at 25.

The Court thereupon proceeded to affirm the judgment of the trial court upon the sole ground as shown

above that "*the note was not duly executed or delivered within the meaning of the terms.*" (Emphasis supplied.)

We have quoted at length from the California decision in order to show that such decision is based exclusively upon the fact that the delivery of the original note was conditional depending upon the additional signature thereto of Bramblett or ratification by the individuals signing and was not executed and delivered within the meaning of that term. With this view we wholeheartedly agree.

The Arizona trial court in the instant case expressly found all of the allegations of fact in the complaint were true and therefore found all of the issues in favor of plaintiff W. Francis Wilson and against the defendants C. M. S. Kipling and Ernest K. Bramblett and Lois Bramblett, his wife, because they were not served in the California case with process and did not appear or answer in that case, and entered judgment against them. However, the court found that the California judgment was res judicata as to all defendants appearing and answering in that case and entered judgment in their favor and against the plaintiff upon the ground of res judicata alone. From this portion of the judgment plaintiff has appealed to this court.

We therefore have presented for our consideration the sole question of whether the California judgment is res judicata as to the defendants there and consequently whether plaintiff may maintain the instant cause of action.

It is, of course, urged by defendants here that it is, and by plaintiff that it is not res judicata.

The Califorina court was presented first with the question of whether the note sued upon was a valid contract since one of the defenses was that the note was delivered conditionally for the purpose of procuring the signature of J. Newton Bramblett, another member of the copartnership. The court found the note to be invalid because the signature of J. Newton Bramblett to said note was never procured and the original note never returned to plaintiff. In other words, it found the original note had never been delivered to plaintiff and that the copy retained by plaintiff had been materially altered by adding the signature of the Kipling Syndicate by C. M. S. Kipling and that Kipling had no authority to sign the name of the copartnership thereto. Of course, if the original note was not delivered under the circumstances of the case it could not be claimed that there was a delivery of the copy retained by plaintiff. When the court found nondelivery of the original note it followed as a matter of law that the note was invalid and that judgment must be entered for defendants regardless of whether the plaintiff had rendered valuable services for defendants or whether defendants had paid him therefor.

With respect to whether the California decision is conclusive upon this court in a different cause of action arising out of the same transaction we have adopted the language laid down in 34 C. J. 909 to the effect that:

> "The rule is often stated in general terms that a judgment is conclusive not only upon the questions actually contested and determined, but upon all matters which might have been litigated and decided in that suit; and this is undoubtedly true of all matters properly belonging to the subject of the controversy and within the scope of the issues, so that each party must make the most of his case or defense, bringing forward all his facts, grounds, reasons, or evidence in support of it, on pain of being barred from showing such omitted matter in a subsequent suit; and it is also true that where the second suit is upon the same cause of action all matters which might have been litigated are conclusively settled by the judgment; * * * *But the weight of authority is that where the second action, although between the same parties, is on a different cause of action, the judgment is not conclusive on all matters which might have been litigated in the former action, but only as to such points or questions as were actually in issue and adjudicated thereon.*" (Emphasis supplied.) Fischer v. Hammons, 259 P. 676, 678, 32 Ariz. 423, 430 (1927).

Our Rule 18(a) insofar as here pertinent provides that:

> "The plaintiff in his complaint * * * may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. * * * " 16 A.R.S.R. Civ. P.

In this jurisdiction this has long been the recognized practice.

As early as 1928 in the case of Kunselman v. Southern Pac. R. R. Co., 33 Ariz. 250, 263 P. 939, we held that an action on an open account constituted a different cause of action to an action on an account stated, although arising out of the same transaction. Plaintiff in that case brought his action on an open account. Later, after the statute of limitations had run he attempted to amend his complaint to plead an account stated. The court held that this was not an amendment but that he had pleaded a new cause of action and therefore the statute of limitations had run against it and ordered the action dismissed.

The court said:

> "The fact that the same debt lies at the foundation of distinct causes of action does not render them identical. * * *" 33 Ariz. at 258, 263 P. at 941.

and after illustrating the truth of this statement, not pertinent here, stated that:

> "The test generally laid down for a departure is whether proof of additional facts will be required. * * *" 33 Ariz. at 259, 263 P. at 941.

citing 21 R.C.L. 583 and 31 Cyc. 418. This is still the law in this jurisdiction and it refutes the contention that joinder of several causes of action is compulsory.

Now, let us apply the above test to the instant case. Had the notes in the California case been held to be valid and enforceable the only evidence required of plaintiff to entitle him to judgment would have been to prove that defendants were the persons who exe-

cuted and delivered the note to him and that the debt had not been paid, introduce the note in evidence and rest his case. Consideration is presumed §44-424 A.R.S., and the burden was on defendants to prove failure of consideration or any other defense interposed. The defendants proved nondelivery of the note; that it was materially altered, etc. The appellate court rested its decision upon its nondelivery.

The issues in that case and the evidence introduced therein necessary to support the judgment of the trial court were entirely foreign to the facts necessary to be proved in either count in the instant case. And the evidence to support a judgment for plaintiff in that case to entitle him to judgment was in no respect similar to the evidence in the instant case. Upon proving nondelivery of the note defendants were then and there entitled to judgment. This merely deprived plaintiff of his one means of proving that defendants were indebted to him in that case but did not close the door to him to prove his case in other causes of action available to him.

In the cause of action based upon an open account plaintiff had to prove not only that he rendered the services alleged in his complaint but he had to prove each item thereof and its value.

On the other hand if he proceeded upon the account stated his proof is again different from what he would have to prove on an open account. The items necessary to be proved in the open account are merged into the new agreement fixing the amount stated which is the balance mutually agreed upon between the

plaintiff and defendants and as said in Chittenden and Eastman Co. v. Leader Furniture Co., 23 Ariz. 93, 201 P. 843 (1921):

> "* * * The party in whose favor the balance in a stated account appears is virtually in the position of the holder of a promissory note, while the other party is obligated practically as the maker thereof (Citing cases). Hence the allegation of facts relating to the prior transactions of the parties or referring to the manner in which the new agreement came about has no place in the complaint any more than the facts leading to the giving of a promissory note would be proper in a suit thereon. * * *" 23 Ariz. at 95, 201 P. at 844.

An examination of the California authorities indicated that even if California has not adopted Rule 18(a) of the Federal Rules, it has followed the same practice as we have with respect to the joinder of different causes of action in the same complaint. The case of Goldwater v. Oltman, 210 Cal. 408, 292 P. 624, decided in 1930 is ample proof of that fact as well as the fact that a plaintiff may or may not join all of his causes of action in one complaint. In that case the plaintiff did join his action on a promissory note, on an open account and on a stated account.

The court there said that it seemed to be conceded that all three causes of action were based upon the same transaction and that plaintiff had the right to set them forth and if need be, even inconsistent counts (Citing cases). The court then stated:

> "* * * The law is well settled that in such cases a plaintiff cannot be compelled to elect as to the cause of action upon which he desires to rely. * * *." (Citing cases.) 292 P. at 630.

It later stated it was proper for the plaintiff to join the causes of action in one complaint and it was error for the trial court to compel an election. It would appear to us to logically follow that if a defendant cannot compel an election where two or more causes of action are joined, he cannot require a compulsory joinder in the first place.

The statement in 8 Cal. Jur. (2d), Bills and Notes § 181, is to the same effect as that set forth in the Goldwater case, supra. It states that a person may properly join an action on a promissory note with an action on the original indebtedness such as a book account, together with another on a stated account. The language clearly indicates that it is permissive and refutes the claim that it is compulsory. Having determined that joinder of different causes of action arising out of the same transaction as in the instant case, the conclusion is irresistible that the California judgment between the same parties is not res judicata as to plaintiff's legal rights in the instant action and we so hold.

We have read all the cases cited by defendants and find no support in any of them for their contention that the judgment and decision in the California case is res judicata in the instant case. The cases cited by defendants, we believe, support the views above expressed by us.

Therefore, the judgment of the trial court is affirmed as to C. M. S. Kipling and Ernest K. Bramblett and Lois Bramblett, his wife, and reversed as to the remaining defendants and the cause is remanded to the trial court with directions to enter judgment against said defendants in the amount prayed for together with interest at 6% from August 30, 1951, until paid.

M. T. Phelps,
Justice (Retired).

Concurring:

Charles C. Bernstein,
Chief Justice.

Fred C. Struckmeyer, Jr.,
Justice.

Appendix B

In the District Court of Appeal
of the State of California
Fourth Appellate District

Civil No. 5399

May 28, 1957
(Reported in 151 Cal. App. (2d) 369.)

W. Francis Wilson,
Appellant,
vs.
J. Newton Bramblett, et al.,
Respondents.

Appeal from a judgment of the Superior Court of Fresno County.

Arthur C. Shepard, Judge.

Affirmed.

Action on a promissory note. Judgment for defendants affirmed.

Ivner W. Nielsen, James Robert Nielsen and Kent A. Blake for Appellant.

Aten & Aten and Lawrence W. Young for Respondents.

Griffin, J.—Plaintiff and appellant W. Francis Wilson, an attorney at law in Phoenix, Arizona, brought

this action against certain named defendants, including respondents J. Newton Bramblett, Frank J. Stefanich, Stuart M. White, James G. Huebner, Tim Mazzoni, and F. M. Hammack, to recover on a promissory note for $9,845.54, alleged to have been executed on August 30, 1951, by defendant C. M. S. Kipling (not served) and respondent Stefanich. It was subsequently signed by C. M. S. Kipling, as general partner, under the typewritten title "The Kipling Syndicate." The note was for claimed attorneys' fees rendered to the Kipling Syndicate, a California copartnership. The court found generally in favor of defendants; that no such note was ever *executed or delivered* by said individuals or the partnership; that Kipling's power, as a general partner, was limited, and did not include the power to execute a note on behalf of the syndicate; that the syndicate was a limited partnership, and plaintiff well knew of such limitation and did not act in good faith; that the delivery and liability of the parties under said note was conditioned on the fact that Bramblett, a general partner, would also sign it; that in fact he did not sign it and there was no actual delivery to plaintiff of said note; that it was materially altered by plaintiff and accordingly the note was of no force and effect. Plaintiff was denied recovery. Judgment went for defendants and respondents.

It is appellant's contention that the evidence does not support the findings of (1) a limited partnership; (2) that Kipling and Stefanich did not have authority to execute the note for the partnership; (3) that it

was conditionally delivered or (4) that appellant materially altered it.

The facts indicate that on January 7, 1950, at Fresno, defendants signed articles of limited partnership to acquire and develop and sell certain oil properties in Arizona. It was capitalized under a unit system, showing the names of the limited, as well as the general partners, and the number of units owned by each. The general partners were Bramblett and Stefanich, of California, and Kipling and Harris, of Phoenix, Arizona. Under the partnership agreement the remaining defendants were limited partners and the disbursement of any money was to be made by Bramblett and Stefanich, who had the sole authority to sign all checks. Only the general partners had authority to carry on the business of the copartnership. The limited partnership agreement, although signed by all parties concerned, was neither sworn to nor recorded, as required by Section 15502 of the Corporations Code. The evidence shows the reason it was not recorded was due to the likelihood that other people might be haunting them as prospective investors. Apparently appellant knew of those claimed defects and the court so found. It also found, in effect, that as between the partnership and appellant, there had been a sufficient compliance with the law under subdivision (2) of that section. It does appear that for convenience sake, in purchasing and negotiating for other land or leases, on May 10, 1950, all limited and general partners gave a limited written power of attorney to Kipling to 'execute documents of conveyance . ... leases . . . and such

other documents as are necessary to acquire or dispose of real property belonging to the syndicate. It did not include the execution of promissory notes on behalf of the syndicate. The evidence also shows that the syndicate also formed a corporation and operated through such corporation. Appellant was president of it and acted as attorney for both companies. He had some arrangement to purchase stock in it, if it proved productive. The account of attorney's fees and expenses incurred arose for his advice and services rendered to both. All of the files and records were kept in appellant's office, including a copy of the partnership agreement. Some oil drilling followed which apparently was not entirely successful. Appellant rendered monthly accounts to the syndicate for the claimed indebtedness due him. Harris, a general partner, terminated his interest in the syndicate and the three remaining general partners conducted the business. There is testimony that as to important issues the general plan was to obtain the consent or ratification of all three, but as to minor matters, this was not necessarily always the case.

On August 30, 1951, Stefanich and Kipling met with appellant in his office to obtain some papers from him. Plaintiff refused to turn them over until they had arranged for the payment of his claimed attorney's fees. They were unable to pay him. Appellant then prepared a promissory note, in typewritten form and in duplicate, covering the amount indicated. It recites: '. . . we, the undersigned, jointly and severally promise to pay' plaintiff the amount indicated, at $100 per

month, beginning October 1, 1951, including 4 per cent interest until paid. Then follows three lines under which were typed the names C. M. S. Kipling, Frank J. Stefanich, and J. Newton Bramblett. No mention was made therein of the syndicate, in any form. For all intents and purposes the note on its face indicates an individual liability and not a partnership liability. The note and the copy were then signed by Kipling and Stefanich. There is some conflict in the evidence as to what was said in connection with the claimed delivery of the note. All agreed that Stefanich would return to Fresno, tell Bramblett of the transaction, and see if he would sign it, and if so, it would then be forwarded to appellant. The copy was left with appellant. On Stefanich's return, Bramblett refused to sign, or at least did not sign the original note. Considerable correspondence ensued between the parties. From this it may well be indicated that the original note or the copy was not to be effective as to the other two makers or the partnership unless Bramblett also signed. On September 19, 1951, appellant wrote Stefanich: "I want that note signed by Newt (Bramblett) in exchange for the one that I have, or else I want to know that he isn't going to sign." (It appears that appellant had previously threatened to sue the syndicate and these individuals for this sum, on an open book account.) On September 24, 1951, Stefanich replied that Bramblett was out of town for three weeks and he could not see him until his return; that he explained the situation to Bramblett and he said he wanted to think it over. He wrote: "You have our two signa-

tures which will hold for the time anyhow." On October 8th, Stefanich wrote appellant: "Though Newt hasn't said he won't sign the note, the fact remains he has not. Whether he will join with Kip and I within the next few days I am not at all certain though I think he will. However, this situation raises a point since Kip and I signed under the condition the note wouldn't be binding on either of us if Newt didn't also sign. Just where do we stand?"

On October 12, plaintiff answered:

"My understanding of the delivery of the note was that the executed note which I had in my possession was a settlement of the debt as far as you and Kip were concerned, and that you were to secure a note signed by you, Kip and Newt and return the same to me in exchange for the note that I kept. However, please be informed that if you wish to state that the note was conditionally delivered conditioned upon Newt's signing the note which you have with you, it is perfectly all right with me, and it is possible that my memory in that connection is not correct. If you wish to settle this matter as far as you and Kip are concerned, it will be necessary for you and Kip to write me a letter stating that you ratify the note which has already been delivered. If you wish to settle this matter by executing the note which you have in your hands and have Kip and Newt execute it likewise, you may send the same to me on or before the 20th day of October, together with the first payment due on the 1st day of October, 1951. If I have not received either of the foregoing settlements by that time,

I shall proceed to institute an action for the *collection of the account.*" (Italics ours.)

On October 20th, Stefanich sent $100 "to be applied to the reduction of the open account," and stated to appellant: "Newt has not yet signed the note, so in view of the situation we can let the subject of the note ride until I see you. *Anyway* we decide to proceed, on the open account or a note the result will be the same in the long run for all practical purpose. Certainly I don't want to be bound on a note unless all three of us are similarly bound, I am sure you will agree."

Appellant apparently wrote on the duplicate note that the $100 was a payment on the note. However, on October 23d, appellant replied that he had credited the $100 "to the account" and said:

"I can understand your feeling of not wanting to do something with regard to the account that the other fellows are not willing to cooperate on. The only thing in this regard is that you are probably all jointly and severally liable for the entire amount, and as you say, in the long run there is not a lot of difference between an open account and a note, . . .

"I will expect another hundred dollar payment on the 1st of November, and on the 1st of each month thereafter. However, it is to be distinctly understood that unless the note which I have is *ratified* or the note which you have is *signed by the three of you,* there is no implication whatsoever that no action will be brought on the account even if the hundred dollars is paid each month.

"I appreciate your leaving me in a position where I can best protect myself, and think you are very foolish to let it ride that way." (Italics ours,)

On November 3d, Stefanich enclosed another $100 "for payment of account." Apparently some time passed during these negotiations. No action was filed on the account or on the note. The original note, dated August 30, 1951, was still in the hands of Stefanich. Appellant testified that in December, 1951, Stefanich and Kipling were in his office; that Kipling said he could legally sign for the partnership and appellant had him sign the duplicate note, which had been retained by appellant, adding in typewriting: "The Kipling Syndicate By (Signature) C. M. S. Kipling, General Partner." The original contained no such endorsement or insertion. Bramblett testified it was not until January, 1955, after this action was instituted, that he, for the first time, was informed of this addition. Stefanich testified he was present in Wilson's office in December, 1951, with Kipling, discussing other matters; that the subject of Bramblett's refusal to sign the note came up; that Kipling volunteered the statement that he, as a general partner, was authorized to sign for the partnership but he did not do so at the time; that he did not know Kipling had signed for the partnership, as indicated, until December, 1954; that he never authorized him to sign it as such general partner and he was never notified at the time it was signed that Kipling was signing for the partnership, and that appellant never received his consent nor the consent of any of the general or limited part-

ners to add it. It was not until October 28, 1954, when appellant brought this action.

Many of the several defenses made by respondents and found by the court as to why the note was unenforceable against these defendants appear to be tenable. Without discussing them, we conclude that respondents' liability on the original note and copy thereof sued upon was conditional, depending on the signature of Bramblett or ratification by the individuals signing, and was not duly executed and delivered, within the meaning of that term. This conclusion is sufficiently supported by the evidence and the law, even though appellant retained a copy of the note. It therefore becomes unnecessary to determine the other claimed defenses. Appellant had actual knowledge of the terms of the partnership agreement and the limitations respecting the authority of the members thereof. The return of the original note to appellant was conditioned on its being signed by respondent Bramblett. It was never returned. Respondents' repudiation of the note left plaintiff free to sue on the original account. Although the evidence is conflicting, it appears that Bramblett and Stefanich never authorized the signing of the partnership name to the carbon copy of the note by Kipling. Appellant elected to stand on his chance of recovery on the carbon copy of the note, as thus altered. This was his unfortunate choice. It has been definitely held that where a note is given under an agreement that it is not to become binding until signed by another person, the failure to obtain such additional signature precludes a recovery as between

the original parties or transferees who have notice of the agreement, unless the obtaining of the additional signature is wrongfully prevented by the maker. (10 C.J.S. p. 517 § 79; 8 Cal. Jur. 2d 537, §213; *Rogers v. Harris,* 138 Cal. App. 2d 1, 6 (291 P. 2d 68); *Silva v. Gordo,* 65 Cal. App. 486 (224 P. 757); *Allen's Collection Agency v. Lee,* 73 Cal. App. 68 (238 P. 169); *Peterson v. Matchinske,* 108 Cal. App. 7 (291 P. 248); *Harper v. French,* 29 Cal. App. 2d 214 (84 P. 2d 216); Civ. Code §3097; 8 C.J., p. 206, §336.) Although the evidence on this question, and the question of ratification of the note is conflicting, the Court's finding has evidentiary support.

Judgment affirmed.

Barnard, P. J., and Mussell, J., concurred.